

IT IS ORDERED as set forth below:



Date: April 13, 2012

A handwritten signature in black ink, appearing to read "W. Homer Drake", is written over a horizontal line.

**W. Homer Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
ROBERT ENNIS O'NEAL,	:	11-13535-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Before the Court is the issue of confirmation of a Chapter 13 plan proposed by Robert Ennis O'Neal (hereinafter the "Debtor"). Rena Mitchell (hereinafter "Mitchell") has objected to confirmation and also seeks dismissal of the case. The Court held an evidentiary hearing on February 9, 2012. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 11 U.S.C. § 157(b)(2)(L); § 1334.

FINDINGS OF FACT

The Debtor and Mitchell were married in May 2007 and became separated in December 2009. No children were born of the marriage. The parties were divorced on January 13, 2011, pursuant to a Final Judgment and Decree (hereinafter the "Decree") granted by the Superior Court of Butts County.

At the time of the divorce, the Debtor earned approximately \$30,000 a year working for a business owned by his mother. Mitchell, who had obtained some college education, previously operated her own real estate brokerage, First Choice Realty Group, which she sold prior to the marriage. During the marriage, she also operated a florist business, which she closed in September 2009. At the time of the divorce, Mitchell worked for a trucking company making approximately \$864 per month (or \$10,368 per year).

The Debtor and Mitchell owned a home (hereinafter the "Rose Bud Road Property"). The Debtor also owned a one-half undivided interest in 15.939 acres located on Old Bethel Road, Jackson, Georgia (hereinafter the "Old Bethel Road Property"). The Debtor valued the Old Bethel Road Property at \$44,735, and it was subject to a secured debt of \$26,653. Other than her interest in the Rose Bud Road Property, Mitchell did not own any real property at the time of the divorce.

The Decree states that the "Court hereby adopts the jury findings in this case as a complete settlement of the parties [sic] property and debt issues." A jury verdict was attached to the judgment and states as follows:

[Mitchell]'s awarded \$100,000 to be paid by [the Debtor] \$25,000 to be paid

immediately and \$75,000 to be paid within 12 months. If the \$25,000 is not paid within 60 days or \$75,000 is not paid by 1/13/2012 then [the Debtor] is to pay [Mitchell] \$156,500.

[Mitchell] is relieved of any debt, mortgage obligation, property tax, lien, interest, Georgia Power lease amount and any other charges or amounts related to 112 Rosebud Rd. now or in the future.

In the event there is a foreclosure and a deficiency judgment - not with standing [sic] the language of the prenuptial agreement [the Debtor] is to be sole [sic] responsible for the deficiency amounts. [Mitchell] shall have no responsibility for any deficiency judgment, expenses, or related charges associated with the mortgage at 112 Rosebud Rd.

If the property at 112 Rosebud Rd. is sold for a profit [the Debtor] is entitled to any profit so long as [Mitchell] has been paid in full the \$100,000 or \$156,000 which ever [sic] applies.

Judge Wilson should determine any current home occupancy decisions.

After the divorce, the Debtor later sold the Rose Bud Road Property in a “short sale” transaction, thereby receiving no proceeds. The Debtor borrowed \$25,000 from his mother to pay Mitchell the amount owed immediately under the terms of the Decree, but he never paid the remaining \$75,000 due in January 2012. Instead, he filed the instant bankruptcy petition on October 25, 2011.

The Debtor’s proposed Chapter 13 plan provides for payments of \$350 per month over at least a 36-month period and the contribution of the Debtor’s tax refunds for 2011, 2012, and 2013. Over the life of the plan, the Chapter 13 Trustee would disburse \$4,000 to the Debtor’s attorney in payment of the attorney’s fee, and the remainder of the funds, after the Trustee’s fee, would be paid to Mitchell, the Debtor’s only unsecured creditor. The plan

provides for a payment of a 10% dividend to unsecured creditors. Based on her proof of claim, Mitchell would receive \$15,600. The Debtor's plan does not provide for payment through the Chapter 13 Trustee of any secured claims. The Debtor's only secured creditor, AgSouth Farm Credit, which holds the mortgage on the Old Bethel Road Property, would be paid directly by the Debtor's mother, who is a co-debtor on the loan.

CONCLUSIONS OF LAW

Mitchell objects to confirmation and moves for dismissal of the case. First, she contends that the Decree imposes upon the Debtor an obligation to pay a "domestic support obligation," and, therefore, the plan's failure to provide priority treatment to that debt runs afoul of section 1322(a)(2) and 1325(a)(8). Second, even if the obligation owed under the Decree is not a "domestic support obligation," Mitchell submits that the Debtor has filed this case in bad faith and, therefore, the plan cannot be confirmed and the case should be dismissed.

A. *Whether the Decree Imposes a Domestic Support Obligation on the Debtor.*

To be entitled to full payment under section 1322(a)(2), a debt must be a "claim entitled to priority under section 507." 11 U.S.C. § 1322(a)(2). Section 507(a) assigns the first priority of payment to "[a]llowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition . . . are owed to or recoverable by a" former spouse. *Id.* § 507(a)(1)(A). The Code defines the term "domestic support obligation" as "a

debt that accrues before, on, or after the date of the order for relief . . . including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of [the Code], that is”: 1) “owed to or recoverable by” a spouse or former spouse; 2) “in the nature of alimony, maintenance, or support” of such spouse or former spouse, “without regard to whether such debt is expressly so designated”; 3) “established or subject to establishment before, on, or after the date of the order for relief . . . by reason of applicable provisions of” a divorce decree; and 4) “not assigned to a governmental entity” *Id.* § 101(14A).¹

Accordingly, to obtain priority payment, Mitchell must establish that she is the Debtor’s former spouse, that her claim is “in the nature of alimony, maintenance, or support,” that her claim was established by the divorce decree, and that her claim was not assigned to a governmental entity. As there is no dispute as to three of these elements, the Court need only determine whether the Debtor’s obligation to pay Mitchell is a claim that is “in the nature of alimony, maintenance, or support.”

The question of whether a debt is “in the nature of alimony, maintenance, or support” is a question of federal law. *In re Strickland*, 90 F.3d 444 (11th Cir.1996); *In re Smith*, 586 F.3d 69, 73 (1st Cir. 2009). “Thus, a label placed upon the obligation by the consent

¹ “In determining whether an obligation constitutes a [domestic support obligation], the Court looks to the interpretation of [domestic support obligations] in case law involving the dischargeability of debts under § 523(a)(5), as enacted prior to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).” *In re Krueger*, 457 B.R. 465, 474 (Bankr. D.S.C. 2011).

agreement or court order which created it will not determine its subsequent [treatment] in bankruptcy.” *In re Robinson*, 193 B.R. 367, 372 (Bankr. N.D. Ga. 1996) (Drake, J.). Instead, the Court should consider the intent of the state court in including certain provisions within the divorce decree. If the evidence suggests that the obligation was imposed upon the debtor as a means of providing support for the debtor's former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the obligation was an attempt to divide the marital property or liabilities, the Court should find that the obligation is not in the nature of support.

In determining the intent of the state court, it is helpful for the Court to consider such factors as: 1) whether the obligation is tied to a contingency, such as a child reaching the age of majority; 2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; 3) whether the obligation is payable in a lump sum or in installments; 4) the respective physical health of the spouses and their levels of education; and 5) whether there was an actual need for support at the time of the divorce. *Id.* The burden of proof on the issue of whether a debt is “in the nature of support, alimony, or maintenance” rests with the creditor. *Smith*, 586 F.3d at 73 ; *In re Krueger*, 457 B.R. 465 (Bankr. D. S.C. 2011); *In re Clark*, 441 B.R. 752 (Bankr. M.D. N.C. 2011).

Having considered the evidence and arguments of the parties, the Court finds that, under the circumstances in existence at the time the parties were divorced, the Debtor's obligation to pay Mitchell was simply a means of dividing the marital property and liabilities. The jury awarded a lump sum to Mitchell, rather than ongoing payments, which

tends to suggest the award was meant to compensate Mitchell for allowing the Debtor to retain the marital home. Further, the obligation is not tied to any contingency related to Mitchell's need for support. In other words, the Debtor would have been obligated to make the payment, even if Mitchell had died or remarried before the payment was due.

Second, although there is evidence of disparate incomes between the parties at the time of the divorce and of the need for support, the Court cannot conclude that the jury imposed the obligation on the Debtor in order to balance that disparity or to require the Debtor to provide such support. Other factors reasonably explain the lack of an award of alimony in this case. The parties were married less than two years before separating and had no children together. Although Mitchell earned only a third of what the Debtor made at the time of the divorce, she testified that, prior to the marriage, she had operated her own real estate company and during the marriage she had owned a florist business. Mitchell's previous business experience, the fact that she had some college education, the brevity of the marriage, the lack of any minor children in the household, the fact that she appeared to be capable of working more than part time, and the fact that she had apparently supported herself without the Debtor's assistance for many years before their short-lived marriage are all factors that reasonably justify not awarding alimony to Mitchell.

Mitchell asserts that the \$100,000 award was intended as support because the jury was aware that she needed financial support and because the jury intended to provide her with the means to relocate and obtain another place to live. In support of this argument, she cites *In re Swindle*, 1993 WL 13003873 (Bankr. S.D. Ga. 1993). In that case, the court

determined that, although the parties made roughly the same income, a debt of \$2,500 owed by the debtor to his former wife was nondischargeable support because the parties, in reaching their settlement, agreed that the Debtor would keep the marital home and his former wife would receive funds to allow her to obtain a new place to live. As a place to live was a necessity, the court determined that the \$2,500 debt was nondischargeable support.

This case is distinguishable from the *Swindle* case. First, in the *Swindle* case, the court was interpreting the meaning of a settlement agreement entered into between the parties. The court could, therefore, rely on the testimony of the ex-spouse that the parties had intended the amount to be used by her to relocate after being required to vacate the marital home. Here, the Court must discern the intent of the state court in adopting the jury verdict, and, therefore, Mitchell's testimony as to her expectation or desire that she would be given funds to help her relocate is not particularly probative of what the jury intended. Second, in *Swindle*, the amount awarded was a relatively small sum that would have been sufficient to allow the ex-spouse to obtain basic housing. Here, the award at issue is \$100,000 (with the potential to become \$156,000), an amount that well exceeded the sum needed to obtain a new place to live. Finally, the award at issue in *Swindle* was due and payable immediately, which is consistent with the need of a spouse to obtain a new place to live, while the bulk of the award in this case was not due and payable for a year following the divorce. Further, as the jury verdict actually appears to leave the decision of who would live in the marital home up to the judge, it is not even clear that the jury anticipated Mitchell

would be relocating.

That being said, if the jury did intend to provide Mitchell with sufficient funds to relocate, it would be more reasonable to conclude that the jury made \$25,000 of the overall award payable immediately for just that purpose and made the remaining \$75,000 due in one year as a means of dividing the parties' property and debts. In such a case, however, if the initial \$25,000 payment was intended as support, the Debtor has paid those funds and that portion of the obligation is no longer outstanding or at issue in this case.

Finally, although the label placed by the state court on the obligation is not conclusive, it is some evidence as to the intent of the court in adopting the jury's verdict. The Decree states that the court adopted the jury's findings "as a complete settlement of the parties [sic] property and debt issues." The language of the Decree, therefore, also supports the conclusion that the state court intended the payment as a means to divide property and debts, rather than as a method to provide support. Having considered the available evidence, the Court concludes that Mitchell has not carried her burden of demonstrating that the state court intended to provide for Mitchell's support.

B. Whether the Debtor Filed His Petition in Bad Faith

Mitchell asserts that the Debtor filed his petition in bad faith. Accordingly, she moves for dismissal of the Debtor's case for "cause," pursuant to section 1307(c). Although Mitchell's objection does not specifically raise the issue of whether the Debtor proposed his plan in good faith, the Court notes that it could not confirm the Debtor's plan without first

concluding that the Debtor did so. *See* 11 U.S.C. § 1325(a)(3); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Likewise, the Court must find that the plan meets all of the other requirements for confirmation. “Although the chapter 13 debtor bears the ultimate burden of proof on confirmation, ‘[a] party objecting to confirmation initially must go forward with some evidence that the criteria for confirmation are not met.’” *In re Glisson*, 430 B.R. 920 (Bankr. S.D. Ga. 2009) (quoting *Gen. Motors Acceptance Corp. v. Johnson (In re Johnson)*, 145 B.R. 108, 111 (Bankr. S.D. Ga.1992), *rev'd on other grounds*, 165 B.R. 524 (S.D. Ga.1994)).

Notwithstanding the fact that a debtor’s good faith is relevant to the consideration of several statutory provisions, the Bankruptcy Code does not define the term “good faith.” Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter “BAPCPA”), the Code required only that the plan be proposed in good faith. Section 1325(a) did not require the court find as a prerequisite to confirmation that the debtor filed the petition itself in good faith. *In re Kitchens*, 702 F.3d 885, 888-89 (11th Cir. 1983) (providing a list of non-exclusive factors to assist bankruptcy courts in determining whether the debtor proposed a plan in good faith); *see also In re Gibson*, 45 B.R. 783, 786 (Bankr. N.D. Ga. 1985) (Drake, J.). Yet, section 1307(c) permitted bankruptcy courts to dismiss cases under section 1307(c) upon finding that the debtor filed the petition in bad faith. *See In re Waldron*, 785 F.2d 936 (11th Cir. 1986); *see also Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373, 127 S. Ct. 1105, 1111 (2007) (“Bankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith

conduct as implicitly authorized by the words ‘for cause.’”).

BAPCPA added section 1325(a)(7), which requires a finding that the debtor also filed the petition in good faith. Following the BAPCPA amendments, some courts have recognized that subsections 1325(a)(3) and 1325(a)(7) impose two distinct confirmation requirements. *See In re McCreary*, 2009 WL 5215587 (Bankr. C.D. Ill. 2009). An analysis of the debtor’s good faith in filing the petition and in the filing of the plan should not be identical. *See In re Tomer*, 2009 WL 2029798, *5 (W.D. Va. July 14, 2009). Otherwise, the addition of section 1325(a)(7) would have been unnecessary and the new requirement superfluous.² Some overlap in the factors may exist, however, as both requirements serve to ensure that a debtor does not use Chapter 13 to abuse “the provisions, purpose, or spirit of [Chapter 13]” *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992) (citations omitted).

As to the filing of the petition itself, the Court considers “objective evidence of a fundamentally unfair result and subjective evidence that a debtor filed a petition for a fundamentally unfair purpose.” *McCreary*, 2009 WL 5215587, at *3 (citing *In re Love*, 957 F.2d 1350 (7th Cir. 1992)). At bottom, the essential question before the Court is whether the debtor filed the petition for a “greedy and unworthy purpose.” *See In re Waldron*, 785 F.2d 1986 (11th Cir. 1986) (debtors filed petition in bad faith where they were not insolvent or otherwise in financial distress and filed the case solely for the purpose of rejecting an

² Commentators have suggested that the addition of section 1325(a)(7) evidences Congressional intent that petitions not filed in good faith result in a denial of confirmation, rather than the dismissal of the case. *See* COLLIER’S ON BANKRUPTCY (16th Ed.), ¶ 1325.09.

executory contract; use of bankruptcy relief as “a sword by the rapacious,” rather than as a shield, was an abuse of the intended purpose of the Bankruptcy Code). To assist in the determination of whether the debtor filed the case for a “fundamentally unfair purpose,” courts have developed a nonexhaustive list of factors, including: “the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.” *Love*, 957 F.2d at 1357.

The Court has considered the evidence presented in light of the *Love* factors and is left with the overall impression that the Debtor has demonstrated that he filed his petition in good faith. In support of her contention that the Debtor filed his petition in bad faith, Mitchell focuses on the fact that the debt would have been nondischargeable in a Chapter 7 case, the fact that the Debtor had no other creditors, the Debtor's timing in filing the petition, and Mitchell's allegation that the Debtor was not forthcoming with the Court and his creditors.

It is true that the Debtor owes a debt to Mitchell that he could not discharge outright in a Chapter 7 case. But that is not what the Debtor is attempting to do. He paid \$25,000 of the debt immediately, thus evidencing an intent to honor his obligation, and he is now

proposing to pay what he can afford to pay for at least three years³ and to discharge only what remains after that time. This is what Chapter 13 allows. *See In re Vick*, 327 B.R. 477, 487 (Bankr. M.D. Fla. 2005) (“Debtors who have otherwise nondischargeable claims can get relief in a Chapter 13 case, as long as they make their best possible effort to repay their creditors over three years.”). These facts favor a finding that the Debtor had a legitimate bankruptcy purpose in filing his petition.

As to how the debt arose, there is no evidence or reason to suspect that the Debtor acted in any egregious manner in connection with the divorce proceeding or thereafter. The debt arose out of the dissolution of a short marriage and represents the best attempt by a jury to award Mitchell what it believed to be her share of the value of the marital home. As it turned out, the Debtor was forced to sell that property without receiving any funds with which to pay the debt owed to Mitchell. In this regard, the nature of the debt is unremarkable and in no way distinct from any other unsecured debt.

As to his lack of other creditors, it is obvious, and the Debtor is honest about the fact, that he filed the bankruptcy petition to deal with the debt owed to Mitchell. He is not otherwise in financial distress. Other than one secured debt, which he proposes will be paid by a co-signer, he owes no other debts. He has sufficient funds to meet his living expenses and to pay a portion of his income to Mitchell each month. But even if he were to sell all

³ According to the Debtor’s Form B22C, the Debtor’s annualized “current monthly income” is \$38,800.08, which is below the applicable median income for the Debtor’s household size. The Debtor’s “applicable commitment period,” therefore, is 36 months. *See* 11 U.S.C. § 1325(b)(4).

of his property, he simply does not have enough money to pay her in a lump sum, as directed by the Decree. If the Debtor had not filed bankruptcy prior to the due date of the obligation, he would have been in financial distress. Given the Debtor's lack of alternatives, the Court finds nothing inequitable about the Debtor's decision to file a petition to prevent himself from being in contempt of the Decree. Aside from being a bit more proactive, it is really no different than filing a petition to avoid the impact of a judgment, an ongoing garnishment, or a pending foreclosure.

Further, the Court is not persuaded that the Debtor's decision to file his petition in October 2011 is indicative of bad faith. The Debtor clearly filed the petition in order to avoid having to pay the obligation in full when it came due, but he did not wait until the eve of the day upon which the obligation was due. He also did not file his petition for the sole purpose of delaying Mitchell's ability to collect. He filed the petition in order to propose a plan that would provide for payment of a portion of the amount due. Further, he has not tried to argue that the filing of the petition prevented the amount due from increasing from \$75,000 to \$131,000.

Finally, the Court has considered Mitchell's allegations that the Debtor has not been forthcoming with the Court regarding the extent of his assets and their valuation. Mitchell asserted that the Debtor omitted from his schedules certain property, including: a 50% ownership interest in O'Neal Septic Tank Service, Inc. (hereinafter "OSTS"), the home in which he resides, a 50% ownership interest in a farming operation, including approximately 30 head of cattle, a gun safe, additional guns beyond those included in his schedules, a hot

tub, a zero-turn mower, and certain tools. She also objected to the Debtor's valuation of his 2002 Ford F-250 and introduced evidence of a value much higher than the Debtor's scheduled value of \$6,600. Further, Mitchell questioned the Debtor's claim that he is required to pay \$400 per month in rent to his mother.

Having heard the testimony of Mitchell and the Debtor, having weighed the credibility of both witnesses, and having considered the bases upon which the witnesses have derived their knowledge of the facts, the Court is persuaded that the Debtor has disclosed all of his assets, does in fact pay rent to his mother, and did not intentionally undervalue his vehicle. Much of Mitchell's testimony arose from knowledge she obtained during the time she was married to the Debtor. This knowledge gives Mitchell some basis to form her belief as to the property the Debtor owned on the petition date and to the value of the Debtor's vehicle, but it is not as relevant as her knowledge would have been if she had continued to reside with the Debtor. For example, the Debtor testified that he had sold some of the items Mitchell believed he owned.

Further, Mitchell's belief that the Debtor owned certain other items of personal property came from the fact that the Debtor had possession or use of the property and referred to these items as "his" property. The Debtor explained this with his testimony that the majority of the items mentioned by Mitchell, including OSTs, the home in which the Debtor resides, most of the guns, the gun safe, and certain tools, had belonged to his father, who had previously passed away, leaving the property to his mother by way of a will. The Debtor's testimony on these matters was credible and logical. Further, legal ownership of

these items by the Debtor's mother is not inconsistent with the Debtor's use and enjoyment of them, as he is her son.

The Court appreciates Mitchell's frustration with the fact that the Debtor has the use and enjoyment of property that he does not own. As he acknowledged on the witness stand, he could inherit these items of property some day. Nonetheless, without legal ownership, he has no current right to liquidate those items for payment of his debts. Accordingly, his failure to disclose ownership of the items cannot be a sign of bad faith or an attempt to manipulate the Bankruptcy Code.

In short, the Debtor's bankruptcy filing, unlike the case filed by the debtors in the *Waldron* case, is not an attempt to use the Bankruptcy Code as a sword, but as a shield. The Debtor filed bankruptcy to protect himself against the immediate collection of the funds from his property or his wages. Instead, he proposes to pay a portion of the debt over time. The Debtor has been honest with the Court as to what he owns and what he earns and has cooperated and fulfilled his obligations under the Code. Under the Debtor's proposed plan, Mitchell should receive at least \$15,000. Admittedly, this amount is a small percentage of what the Debtor owes, but paying this amount over three years is no small feat for an individual who makes only \$35,000 a year. Again, this is what Chapter 13 allows, and filing a case for this purpose is, therefore, "consistent with the objectives and purposes of the Code."

C. Did the Debtor Propose his Plan in Good Faith?

As noted above, to obtain confirmation, the Debtor must also satisfy the Court that he has proposed his plan in good faith. 11 U.S.C. § 1325(a)(3). To determine whether the debtor proposed the plan in good faith, the Court considers the nonexclusive *Kitchens* factors. *Kitchens*, 702 F.3d 885, 888-89 (11th Cir. 1983). These include: “(1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the debtor's Chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor's degree of effort; (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought [bankruptcy] relief . . . ; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; and (11) the burden which the plan's administration would place on the trustee.” *Id.*, 702 F.3d 885, 888-89 (11th Cir. 1983); *see also In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982) (court should consider the extent to which claims are modified, the extent of preferential treatment among classes of creditors, and whether such debt would be nondischargeable under chapter 7, and the court should also consider whether the debtor has accurately stated his debts and expenses and, if not, whether the debtor has purposefully attempted to mislead the court).

In *Kitchens*, the court also suggested that the bankruptcy court should not rely exclusively on the factors stated and should be cognizant of other “factors or exceptional circumstances” that might bear on the outcome, such as: 1) the substantiality of the

repayment to the unsecured creditors;⁴ 2) whether the debtor is attempting to discharge a debt that would be nondischargeable in a Chapter 7 case; and 3) the accuracy of the plan's statements of debts and expenses and “whether any inaccuracies are an attempt to mislead the court.” *Kitchens*, 702 F.2d at 889; *see also Gibson*, 45 B.R. at 786 (“The fact that the debtor proposes to discharge a debt that would be nondischargeable in a Chapter 7 case under Bankruptcy Code § 523(a) is not sufficient, standing alone, to find that the Chapter 13 [case] was filed in bad faith.”).

Many of the factors to be considered here favor a finding that the Debtor proposed this plan in good faith for the same reasons stated above. The Debtor earns a modest salary, and there is no evidence or even suggestion that he is not employed to his full potential. His expenses are not unreasonable or extravagant and, again, there is no suggestion that he could spend less on his own support in order to increase his payment to Mitchell. As to the length of the Debtor’s plan, although the plan states that it is a 36-month plan, the Debtor has proposed to pay a 10% dividend, which will likely require the Debtor to remain in the plan for longer than 36 months.

As to his sincerity and motivation in filing a Chapter 13 petition, rather than a Chapter 7 petition, it is clear that he has sought relief under Chapter 13 because it is the only

⁴ Following the enactment of the Bankruptcy Amendments and Federal Judgeships Act of 1984, many courts have found consideration of the amount of the payment to creditors to have been subsumed by the so-called “disposable income” test and have held that the disposable income requirement prevents or limits the court’s ability to consider whether the debtor is contributing all of his income to the plan. *See In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006).

chapter of the Bankruptcy Code that would actually provide any relief. A Chapter 7 case would only have delayed Mitchell's ability to collect the debt owed, and the Debtor would have wasted a Chapter 7 discharge, as he owed no other unsecured debt. In that sense, the Debtor really had only one alternative. Chapter 13 allows for the discharge of the Debtor's debt to Mitchell, and the Court cannot fault him for choosing to avail himself of that opportunity. Finally, this case represents the Debtor's first bankruptcy case, and there are no special circumstances of which the Court is aware that would favor a finding that the Debtor did not propose this plan in good faith.

CONCLUSION

For the reasons stated above, the Court finds that the Debtor's plan satisfies the requirements of sections 1325(a)(3) and (a)(7). Accordingly, Mitchell's objection to confirmation is **OVERRULED** and her Motion to Dismiss is **DENIED**.

The Chapter 13 Trustee shall report to the Court on or before **April 18, 2012** as to whether the Debtor's plan remains in a confirmable posture. If the Trustee reports that the plan remains confirmable and that his previous objections have all been resolved, the Court will enter the confirmation order without further hearing. If not, the Court will schedule a further confirmation hearing.

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